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In the Supreme Court of the United States

OCTOBER TERM, 1982

EDMOND G. MIRANNE and
EDMOND G. MIRANNE, JR.,

Petitioners

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Government failed in its duty to preserve and advise petitioners of the existence of certain exculpatory material in violation of *Brady v. Maryland.*

2. Whether a conviction supported largely be perjured testimony, which perjury is known to the Government, should be allowed to stand.

3. Should a perjury conviction be permitted to stand when it appears probable that in convicting the jury relied upon the testimony of a witness who had perjured himself and this perjury was known to the Government.

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Petition for Writ of Certiorari to the
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The petition of Edmond G. Miranne and Edmond G. Miranne, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 27, 1982.

OPINION BELOW

The opinion of the Court of Appeals in *U.S. v. Miranne*, __F.2d__ (5th Cir. 1982), appears in the appendix hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 27, 1982. A timely petition for panel rehearing as well as a suggestion for rehearing en banc were denied on November 1, 1982. Petitioners sought and were granted a stay of the mandate pending disposition of their application for certiorari. This Court's jurisdiction is therefore invoked under 28 USC 1254 (1). The application is being filed within sixty (60) days of the denial by the Court of Appeals of the petition for panel rehearing and suggestion for rehearing en banc and is, therefore, timely under Rule 20 of this Court.

CONSTITUTIONAL PROVISIONS INVOKED

This case involves the due process clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States.

STATEMENT OF THE CASE

The Indictment

Appellants, Edmond G. Miranne and Edmond G. Miranne, Jr., were indicted on January 29, 1981. Also named as a defendant in the 103-count indictment was Burl R. Mahl, III.

Count 1 charged a conspiracy to commit violations of

18 U.S.C. 657 and 1014. Counts 2 through 51 charged defendants with the substantive offense of making or causing to be made false statements, in violation of 18 U.S.C. 1014 and 2. Counts 52 through 101 charged defendants with the substantive offense of misapplication of funds, in violation of 18 U.S.C. 657 and 2. Counts 102 and 103 charge only defendant, Edmond G. Miranne, with the substantive violation of perjury, in violation of 18 U.S.C. 1621.

Prior to the trial of appellants, defendant Burl R. Mahl, III, tendered a plea of guilty to Count 1, the conspiracy count.

The trial of appellants began on April 13, 1981, and concluded on April 24, 1981. The jury found the defendant, Edmond Miranne, guilty on Counts 1, 26 through 51, 76 through 103. The jury found Edmond G. Miranne, Jr. guilty of Counts 1 through 101.

On May 1, 1981, appellants timely filed a motion for judgment of acquittal notwithstanding the jury's verdict, or alternatively, for a new trial. The motion was heard on May 27, 1981, and taken under submission. On August 3, 1981, by minute entry, the District Court denied appellants' motion. On August 12, 1981, appellants were sentenced. (See Appendix A).

Sometime prior to the sentencing of appellants, co-defendant Mahl was sentenced on his plea of guilty to

Count 1 and received a sentence of two years imprisonment. At that time, the remaining counts against co-defendant Mahl were dismissed in accordance with the plea agreement entered into by the United States of America and Mahl.

STATEMENT OF THE FACTS

In this multi-count indictment, the Government alleged that a conspiracy existed between Edmond G. Miranne, the president of Security Homestead Association, and Edmond G. Miranne, Jr., his son, the attorney and notary for Security Homestead Association, and Mahl, a real estate developer. The Government alleged and attempted to prove at trial that the defendants conspired to defraud the Security Homestead Association by entering into an agreement to misapply the funds of the Association to the benefit of Mahl in his purchase of certain real estate in New Orleans.

The indictment is constructed around 50 loan transactions which were made by the Security Homestead Association to Mahl. The 50 loan transactions occurred on three separate occasions and involved groups of 24, 18, and 8 loans. (Government Exhibits 2-51.) The first loan transaction occurred in January, 1976 (Government Exhibits 2-25), the second loan transaction occurred in February, 1976 (Government Exhibits 26-43), and the third transaction occurred in May, 1976 (Government Exhibits 44-51). The loans on the property involved were made through the

Family Finance Center of the Security Homestead Association. The first 42 loans were made in the amount of $10,000 each and the last 8 loans were made in the amount of $5,000 each.

The Government alleged that the loans were not made for the purpose of improving the property, but were made solely for the purpose of purchasing the property. The Government contended that Mahl used the proceeds of the loans he received to purchase the property. The acts of sale for the various property involved were passed by either defendant Miranne, Sr. or Miranne, Jr.

The record will show that Mahl purchased these properties almost simultaneously with the loan proceeds being distributed to him; however, the record will also show that the Government failed to prove: (1) that the properties were not renovated; and, (2) that Mahl did not have sufficient funds available to him at the time of the loan transactions to actually purchase the property. Not one witness testified that the properties were not, in fact, renovated. The Government did not call tenants of the property, and no testimony was offered from subsequent purchasers as to the condition of the properties. Mahl testified that the property was improved after it was purchased.

The evidence further indicated that Mahl had sufficient financial capacity at the time the loans were made to have purchased the property apart from, and exclusive of, the loans made through Security Homestead Association.

Edmond G. Miranne, Sr. was charged with two counts of perjury based upon two statements made by him to examiners of the Federal Home Loan Bank Board (FHLBB) while he was under oath in connection with an examination by that board. These statements in essence were that he had had no business dealing or financial transaction or dealing with Burl Mahl. The Government contended that he was partners with Mahl in the real estate transactions upon which the other counts in the indictment were based and that a transaction proposed by Mahl in connection with Metairie Towers, a complex owned by Miranne, Sr. and other partners, which transaction never got off the ground amounted to a business dealing or a financial transaction or dealing with Mahl.

SUMMARY OF THE ARGUMENT

The Government failed in its duty to preserve and advise petitioners of the existence of certain exculpatory material in violation of Brady v. Maryland. During the course of trial, the chief Government witnesses were impeached by the Government. Mahl, the co-defendant who had pled to Count 1 and agreed to testify against appellants, was impeached by the Government. Charles Lacoste, an accountant, and Nina Bankston, a former secretary in appellants' law offices at the time of the transactions charged in the indictment, were both impeached by the Government. The only remaining substantial witness, Joseph Toranto, was relied upon by the Government. Toranto was the manager of the Family Finance

Center of Security Homestead Association and had handled the loans to Mahl involved herein.

After the first week of trial, but before the Government had rested and after Mahl had testified for the Government, Mahl found a tape recording of a conversation with Toranto, which, if produced, would have shown conclusively that Toranto had perjured himself. The United States Attorney refused to listen to the tape when offered by Mahl's attorney and by failure to timely seize the tape allowed it to be destroyed by Mahl. The appellants are forever denied the right to present this critical demonstrative evidence to any jury, and the prejudice is so substantial that the indictment should be dismissed. This tape is crucial in light of the circumstances in this case and because of the profound effect such evidence would have upon the sole remaining unimpeached witness.

Whether a conviction supported largely by perjured testimony, which is known by the Government, should be allowed to stand. As stated above, Toranto was the only important Government witness not impeached by the Government. Furthermore, the Government attempted to bolster his testimony by vouching for his credibility.

In the instant case, the United States Attorney was offered an opportunity to hear the tape which would prove that Toranto was lying, he refused, stating that he believed the contents to be as related to him by Mahl's attorney. The Government is thereby charged with the knowledge of

the contents of the tape. The contents of the tape (See Appendix D) as stated in the stipulation of counsel would clearly prove Toranto to be lying. Yet the Government argued that Toranto was a truthful witness.

Since the Government presented perjured testimony and vouched for the credibility of the lying witness, the appellants' convictions should be reversed. The district judge should have granted appellants' motion for judgment notwithstanding the jury's verdict.

Was the evidence involving the perjury counts tainted? The Government simply failed to prove that Miranne, Sr., was a partner with Mahl or that he was involved in financial/business transactions with Mahl. The documentary evidence on partnership shows conclusively that Miranne, Sr., was not a partner with Mahl. Mahl alone testified that Miranne, Sr., was his partner, and Mahl was impeached by the Government over and over again. Mahl was impeached by both the Government and defendants, is not worthy of belief, and cannot be relied upon by the Government to prove a partnership with Miranne, Sr.

Mahl's telephone call to Miranne, Sr. (Government Exhibit 107(b)) did not constitute a business dealing or a financial transaction with Mahl. The verdict of the jury on the perjury counts should be reversed because of the taint of the perjured testimony of Toranto, in addition to the reasons cited above.

ARGUMENT

I. THE GOVERNMENT FAILED IN ITS DUTY TO PRESERVE AND ADVISE PETITIONERS OF THE EXISTENCE OF CERTAIN EXCULPATORY MATERIAL IN VIOLATION OF BRADY V. MARYLAND.

The unusual circumstances surrounding this issue and the following issue require a detailed statement of the bizarre happenings and the resulting intrigue surrounding these events and is contained in the statement of unique facts, Appendix E.

Considering the crucial nature of the tape and the fact that it clearly could be used by the defense to prove that one of the Government's important witnesses had, in fact, committed perjury, the Government's duty to preserve that evidence is clear. Yet, the Government did not issue a subpoena for its production and did not even request of Mulvehill (Mahl's attorney) that Mahl be requested to produce the tape to the Court the following morning.

The United States Attorney, after being advised of the contents of the tape, and refusing to listen to the tape is charged with the knowledge of the contents of the tape and cannot be heard to dispute those contents. Furthermore, to dispute the authenticity of the tape is begging the question. The tape is unavailable to the appellants due to

the failure of the United States Attorney to make the simple request that he be allowed to listen to the tape. Had that simple request been made with a statement that he would be unavailable to listen to the tape until later in the evening, a court order could have been obtained to seize the tape, and the tape would have been preserved for the benefit of the Court and the appellants.

At the point in the trial that the tape was made known to the Government prosecutors, the Government had impeached its key witness, Mahl, and impeached another important Government witness, Charles Lacoste, and had impeached yet another Government witness, Nina Bankston. The only surviving Government witness whom we submit was an important and vital witness to the Government's case, Toranto, had not been impeached. This tape, therefore, would have impeached the only remaining Government witness and would have totally discredited his testimony and perhaps would have caused the jury to throw his testimony out completely. An analysis of the testimony and of the jury's verdict shows that the jury believed Toranto, because Toranto testified that he was introduced to Mahl by Miranne, Jr., that Miranne, Sr., did not really come into the picture until after the first 24 loans were consummated. Mahl, on the other hand, testified that Miranne, Sr., introduced him to Toranto before the first 24 loan transactions. The jury found Miranne, Jr., guilty on all counts and acquitted Miranne, Sr., on all counts relating to the first 24 loans. The jury apparently concluded that Toranto was testifying truthfully and even disregarded the

documentary evidence which showed that Miranne, Sr., had, in fact, passed the act of sale on the first 24 properties.

Appellants filed timely *Brady/Giglio* motions with the specificity required by *United States v. Agurs*, 427 US 97, 96 S.Ct. 2392, 49 L.Ed. 342. Appellants asked for all evidence within the possession of the Government affecting the credibility of Government witnesses, and it became the duty of the Government to advise the attorneys for the defendants that Mahl, then a Government witness, had informed the Government that Toranto was lying as aforesaid. Mahl testified at trial that he clearly told the Government several times that Toranto was not being truthful, and that Toranto knew all along that he was purchasing the property. In response to appellants' *Brady/Giglio* requests and *Jencks Act* requests, the Government produced "no material" concerning Mahl. As to Toranto, the Government only produced his grand jury testimony which was merely a return on records and his statements before the Federal Home Loan Bank Board.

The Government's duty to disclose and preserve exculpatory evidence is clearly set forth in this Court's landmark decisions of *Brady v. Maryland*, 373 US 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1973) and *Giglio v. United States*, 405 US 150, 92 S.Ct. 763, 31 L.Ed. 2d 104 (1972). The *Brady* and *Giglio* decisions, *supra*, have to an extent been qualified by this Honorable Court in *United States v. Agurs*, 427 US 97, 96 S.Ct. 2392, 49 L.Ed. 342, in which it was held that a certain degree of specificity must be follow-

ed in requests for information under the *Brady* and *Giglio* decisions.

It is undeniably true that one Government witness stating that another Government witness is lying in his testimony would have an adverse effect upon the credibility of the Government witness whose truthfulness is questioned by his brother witness. The fact that Mahl had from the outset insisted that Joseph Toranto was lying and that this fact was not furnished to the defense by the Government is in flagrant violation of the *Brady/Giglio* doctrine.

The Third Circuit in *United States v. McCrane*, 527 F.2d 906, at 912 (1975), held that it was error for the Government to withhold material which would have assisted the defendant in casting doubt on the credibility of a crucial witness against him. See also, *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980), in which a new trial was granted when the Government permitted to go uncorrected its witness' false testimony to the effect that he had had only one previous felony conviction.

The *Auten* decision clearly states that the prosecution is obligated to disclose *Brady* material not actually in its possession, and yet capable of being reduced to its possession. In the instant case, Mahl, the "owner" of the tape in question, was a Government witness, and the tape in his possession was subject to seizure by the Government with whom he had an ongoing relationship.

We submit to the Court that the Government acted unreasonably in not making a simple request which would preserve a most vital piece of evidence in this case. The tape recording is lost forever. That piece of demonstrative evidence speaks louder than anyone's recollection of what was on the tape. Reasonable people can differ in their memories of the contents of the tape. The jury could completely disbelieve Mahl because of Mahl's incredulous position at this time, having been indicted for perjury after having been a Government witness. To call Mahl as a witness for the defense and ask him the contents of the tape would be a useless and vain thing, since the Government has attacked him and now indicted him, and is now attacking the authenticity of the tape itself. We respectfully submit that on a retrial, the jury might even believe that Mahl made the whole tape up or in some fashion doctored previous tapes to make it sound like a tape made at the time of the original 24 loan transactions. With the destruction of the tape, the defense was not given the opportunity to prove the authenticity of the tape and to prove that Toranto was lying.

It is respectfully submitted that the Government failed in its duty under *Brady v. Maryland*, after specific requests had been made by the defendants in two respects: the Government first did not produce and notify counsel for the defendant that Mahl insisted that Toranto was lying, and secondly, the Government failed to take steps to preserve the tape recording which could have assisted the defense in showing that Toranto was committing perjury.

The convictions of appellants should be reversed.

II. WHETHER A CONVICTION SUPPORTED LARGELY BY PERJURED TESTIMONY, WHICH IS KNOWN BY THE GOVERNMENT, SHOULD BE ALLOWED TO STAND.

Federal prosecutors are under an affirmative obligation, not merely to avoid using perjured testimony, but also to correct false testimony by its witnesses. Furthermore, prosecutors may not vouch for the credibility of their witnesses. We respectfully submit whereas in the instant case a federal prosecutor transgresses both prohibitions, manifest error exists and a conviction cannot stand.

The text of the closing argument made by counsel for the Government makes it abundantly clear not only that there was no admission, either tacit or otherwise, by the Government that the witness Toranto had lied, but on the contrary, that there was an effort by the Government to have the jury believe this witness whom the Government knew very well had perjured himself. When the United States Attorney, having been given the opportunity to hear the tape recording referred to earlier, refused and relied upon the word of the Federal Public Defender, Jack Mulvehill, the United States Attorney was charged with the knowledge of the contents of the tape. Such knowledge and contents clearly place the United States in a position of knowing that one of its important witnesses had committed perjury.

During the closing argument of defense counsel, Mr. Richard argued that the tape recording contradicted and impeached Joseph Toranto. (Vol. 12, Page 35-36.) In Mr. Burns' opening summation, he argued that Mr. Toranto was a credible witness. Mr. Schatzow in closing argument argued, Vol. 12, page 81:

> "The worst thing that has been said in this Court, in two weeks, is what I have listened to today about the attacks (by Dymond and Richard) on Joe Toranto, and the reason it is so bad, ladies and gentlemen, there are two reasons for it...

In his closing summation, Mr. Schatzow argued that the tape recording was not in evidence and that Mahl's testimony about its contents was as incredible as his other uncorroborated testimony was argued to be (Vol. 12, page 82). Mr. Schatzow argued that neither the jury, he, Mr. Collignon (FBI agent) nor Mr. Burns (Assistant U.S. Attorney) heard the tape. He conveniently left out the fact that Mr. Volz (the U.S. Attorney) had been offered the opportunity to hear the tape but had declined to do so. (Vol. 12, Page 82.)

The law is clear that federal prosecutors may not stand by silently while a Government witness gives false testimony:

> "In *Napue v. Illinois*, 1959, 360 US 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217, the Supreme Court made clear in no uncertain terms that due process is violated when the prosecutor obtains a convic-

> tion with the aid of false evidence which it knows to be false and allows to go uncorrected. *It is immaterial whether or not the prosecution consciously solicited the false evidence. It is also immaterial whether the false testimony directly concerns an essential element of the Government's proof or whether it bears only upon the credibility of the witness.* In *Napue*, '(t)he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.' 360 US at 269, 79 S.Ct. at 1177." *United States v. Barham*, 595 F.2d 231, 241-42 (5th Cir. 1979) (Footnote omitted; emphasis added).

As noted in *Barham*, the foregoing prohibition does not merely proscribe the solicitation of perjury, but requires the Government affirmatively to correct any false testimony given by its witnesses at trial. See, e.g., *United States v. Fontenot*, 628 F.2d 921, 924 (5th Cir. 1980) and *United States v. Iverson*, 637 F.2d 799 (D.C. Cir. 1980).

The Government's obligation in this regard arises not only where it knows that its witness is giving false testimony, but also where it should know that its witness is giving false testimony. "The Government may be responsible even if the prosecutor did not actually know the testimony was perjured, but should have known." *United States v. Runge*, 593 F.2d 66, 73 (8th Cir. 1979). *See also: Giglio v. United States*, 405 US 150 (1972); *United States v. Agurs*, 427 US 97, 103 (1976).

We respectfully submit that there is a minimal showing of materiality necessary for a reversal of convictions obtained with the aid of false testimony. Reversal "is required if 'the false testimony could...in any reasonable likelihood have affected the judgment of the jury'..." *Giglio v. United States, supra,* 405 US at 154, quoting *Napue v. Illinois,* 360 US 264, 271 (1959).

> "(T)his 'reasonable likelihood' standard of materiality is a 'low threshold' standard...It is a brother, if not a twin, of the standard ('harmless beyond a reasonable doubt') for determining whether constitutional error can be held harmless ....A strict standard is appropriate because, as the Supreme Court has explained, false testimony cases involve not only 'prosecutorial misconduct,' but also 'a corruption of the truth-seeking function of the trial process,' *United States v. Agurs,* supra, 427 US at 104, 96 S.Ct. at 2397. *United States v. Barham,* supra, 595 F.2d at 242."

Where as in the case at bar, the nondisclosure bears upon the testimony of a key witness, the 'reasonable likelihood' standard invariably requires a reversal. *See, e.g., Giglio v. United States, supra; United States v. Barham, supra:*

> "In this case, in which credibility weighed so heavily in the balance, we cannot conclude that the jury, had it been given a specific reason to discredit the testimony of these key Government witnesses, would still have found that the Government's case and Barham's guilt had been established beyond a reasonable doubt. We therefore reverse Barham's convictions...*United States v. Barham,* F.2d at 243.

In *Miller v. Pate*, 386 U.S. 1 (1967), a prosecutor adduced false evidence that stains on a pair of undershorts were blood and then made frequent reference to the "bloody shorts" during the trial. The "bloody shorts" made the circumstantial case against the defendant strong. Following the trial, the defense had the shorts analyzed and the stain was found to have been paint, not blood. Because the prosecution's theory of the case relied upon the "consistent and repeated misrepresentation" that the stain was caused from blood, and citing a then long history of reversals for such a cause, this Honorable Court reversed that conviction.

The instant case is very much like *Miller* in that the prosecution, knowing the contents of the destroyed tape recording, argued to the jury the credibility of Joseph Toranto. This was a deliberate misrepresentation of which the Government was able to avail itself in rebuttal argument only because it had kept the unassailable testimony of Mulvehill from the jury by succeeding in its objection that such testimony would have been hearsay. The suggestion by the prosecutor that Mulvehill could have testified about the tape was nothing short of a deliberate misrepresentation to the jury that the tape did not say what Mahl said it did. The Government asked the jury to believe only testimony by Mahl which had been corroborated and then took advantage of the Court's ruling (as will be further commented upon *infra*) excluding the corroborative evidence to have the jury infer that Mahl's testimony was not worthy of belief. Combined with the

holdings in *Miller, supra*, and *Ellis, Garza and Sanfilippo, infra*, this was a forbidden "use" of false testimony of Toranto which is proscribed in *Napue* and *Barham, supra*.

In light of the foregoing principles, the prosecutor's failure in the case *sub judice* to take corrective measures after the tape of Toranto's earlier conversation with Mahl was brought to the Government's attention vitiates the conviction. This was not, after all, a case wherein the prosecution first learned of its witness' false testimony after the trial. At the time it learned of the tape, the Government was still conducting its case-in-chief. Hence, it could have recalled Toranto to the stand. *See: United States v. Fontenot, supra*. Nor is it of any significance that the existence of the tape was revealed to the United States Attorney, rather than to his Assistant actually conducting the trial. *Giglio v. United States, supra*. By acknowledging to Mahl's attorney that he would not question the existence or contents of the tape, the United States Attorney effectively foreclosed the Government from denying that Toranto's testimony was false. Hence, the prosecutor's failure to take corrective measures at trial constituted error.

Where the nondisclosure aids the testimony of a "key" Government witness, the standard enunciated in *Giglio* invariably requires reversal of the conviction. *United States v. Barham, supra*, at 243.

The error was not restricted to mere nondisclosure, moreover, but was compounded by the prosecutor's repre-

sentation to the jury that Toranto was a credible witness.

In his closing argument, Assistant U.S. Attorney Schatzow made statements which were unquestionably supportive of a contention that Toranto's testimony was truthful. He said that no member of the U.S. Attorney's Office had even heard this tape, that it was never tested for authenticity, that the only person who contradicted Toranto's testimony was Mahl and that Mahl was not worthy of belief. He even called Mahl a double-agent, indicating the defense was given an opportunity to listen to the tape and the Government was not, knowing full well that Volz had been offered the opportunity to listen to the tape and had refused. The Assistant U.S. Attorney was attempting to induce the jury, and he so argued, to believe the testimony of Toranto in its entirety.

The Government concealed from the jury, during its rebuttal argument after which defense counsel had no further opportunity to address the jury, that Mulvehill's inability to testify about the contents of the tape recording and thus corroborate Mahl's testimony was caused by the Court's ruling on the Government's hearsay objection. The prosecutor inferred that defense counsel could have testified about the tape's contents but had not done so. The prosecutor did not disclose that he would have made the same hearsay objection if counsel had attempted to testify about the contents of the tape recording. The prosecutor deceived the jury when he argued that he did not know what was on the tape recording. He had heard the ac-

counts of Messrs. Volz, Mulvehill, and Mahl, all of which were consistent. He had also heard the declarations by defense counsel about what they had heard, which declarations were not contradicted by Mulvehill or Mahl. Despite denying knowledge of the tape's content, Schatzow made the direct statement that the Government's case was not benefitted by the destruction of the tape. He inferred that Mahl may even have falsified the tape recording.

Prosecutors' "(a)ttempts to bolster a witness by vouching for his credibility are normally improper and error." *United States v. Ellis*, 547 F.2d 863, 869 (5th Cir. 1977). *See: e.g., United States v. Garza*, 608 F.2d 659 (5th Cir. 1979) (reversing a conviction for, *inter alia*, improper arguments by the prosecutor that the Government's witnesses were credible, holding that, even though the defendant's attorney had failed to object to these arguments, they were plain error.)

Illustrative of the prosecution's cumulative error in the instant case is *United States v. Sanfilippo*, 564 F.2d 176 (5th Cir. 1977). There, the prosecution not only failed to correct its witness' false denial on cross-examination that he had been promised leniency in exchange for his testimony, but also argued his credibility in closing argument. These two actions in conjunction constituted reversible error.

Similarly, in *United States v. Bigeleiser*, 625 F.2d 203 (8th Cir. 1980), the Court reversed a conspiracy convic-

tion where the prosecutor not only failed to correct the false testimony of a co-conspirator who became a witness for the Government, but also implied that the witness was credible during summation.

Upon learning of the contents of the tape and that its remaining important Government witness had committed perjury, the Government had several options: it could have abandoned the prosecution, it could have moved for a continuance, or it could have moved for a mistrial. The Government, however, chose to go on with its prosecution and even chose to argue to the jury the perjured testimony.

In this case, as in all cases, the jury was entitled to be informed of all pertinent facts. It would have been very easy for the United States Attorney to have issued a subpoena duces tecum for the tape in question, had it presented to the jury, and permitted the jury to consider it along with the other evidence in determining whether or not Joseph Toranto was worthy of their belief. This action has now been rendered impossible as the tape has been destroyed and, therefore, in order to preserve the integrity of the prosecutorial process of the United States, the convictions appealed from should be reversed.

III. WAS THE EVIDENCE INVOLVING THE PERJURY COUNTS TAINTED?

The two perjury counts, against Miranne, Sr., are based upon two separate statements made to examiners of

the Federal Home Loan Bank Board (FHLBB) while Miranne was under oath in connection with an examination by the FHLBB.

The Government alleged that Miranne's statements were untrue for two reasons. First, that he was a partner with Mahl in the real estate transactions upon which the other counts of the indictment are based; and, secondly, that a transaction proposed by Mahl in connection with Metairie Towers, a complex owned by Miranne, Sr., with other partners, which transaction never got off the ground, amounted to a business dealing or a financial transaction or dealing with Mahl.

Was there a partnership? At the outset, it should be remembered that the Government impeached practically every material witness that they placed on the stand.

What does the documentary evidence show in regard to the existence or non-existence of a partnership between Miranne, Sr. and Mahl?

(a) Government Exhibit 145(a), is an engagement letter which according to Government witness, Charles Lacoste, outlined an agreement under the terms of which his CPA firm was to be retained to do work for a proposed partnership. This engagement letter is not addressed to Miranne, Sr., he is not even mentioned in the letter, and he never received either the original or a copy thereof.

(b) At the time of the alleged partnership formation, Lacoste was a member of the CPA firm of Trahan, Kernion and Derbes. Several conferences were held with Lacoste in connection with a proposed partnership, and none of said conferences were attended by Miranne, Sr. Further, he was never billed for any services in connection with these conferences, the payment for said services having been made by Mahl.

(c) The $50,000 check allegedly representing one-half of the "front money" on one of the real estate transactions was payable to Miranne, Jr., and not Miranne, Sr. Mahl could not explain this fact.

(d) The evidence clearly shows that Miranne, Sr., did not derive any of the benefits that would have been expected to flow to a partner or co-owner of real estate. He did not receive any of the rental income from the properties. He did not receive any of the profits when individual properties were sold. He did not get the benefit of any depreciation on his income tax returns.

(2) Defense Exhibit 1 is a $130,000 note from Mahl to Security Homestead in satisfaction of the loss that the Homestead had incurred on the transactions involved in the indictment. A person like Mahl would be unwilling to obligate himself for this entire loss if he had a partner who was liable for a substantial part of it.

The documentary evidence did not prove that

Miranne, Sr., and Mahl were partners in the real estate transactions in question. This being the case, it is equally obvious that the jury must have relied upon the testimony of witnesses or a witness in being convinced of the existence of the partnership. A reading of the testimony of Mahl shows that it is inconceivable that the jury could have relied on his testimony. The man was thoroughly impeached, and every member of the jury was so convinced. This leaves only the testimony of Toranto upon which the jury could have relied. Had the Government acted properly, this witness, Toranto, would have been shown to be equally as unworthy of belief as was Mahl.

Under these circumstances, the impropriety of the actions of the prosecutors in failing to expose the perjured testimony of Toranto to the jury and in arguing the credibility of that witness, knowing him to have perjured himself, is applicable to these counts as well as to the other counts of the indictment.

We will never know just what influence the testimony of Toranto, coupled with the fact that it was buttressed by the Government, had upon the jury, and the vital importance of the preservation of the integrity of our judicial system does not permit speculation on this question. As was said by this Honorable Court in *Giglio v. United States, supra,* quoting *Napue v. Illinois, supra,* "Reversal is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury." This principle was adhered to in *United States v.*

Agurs, supra, and *United States v. Barham, supra.* Did Mahl's telephone call to Miranne, Sr., in regard to Metairie Towers constitute a business dealing or a financial transaction or dealing with Mahl?

It is submitted that this telephone call which was placed by Mahl to Miranne, Sr., was nothing more or less than Mahl attempting to persuade business from Miranne, Sr. to enter a business dealing with him, but without success.

The Government attempted to prove that this telephone conversation constituted a dealing or transaction between Mahl and Miranne, Sr., by introducing a tape recording of said conversation (Government Exhibit 107(a), Transcript Exhibit 107(b)), and by the testimony of two examiners for the FHLBB, DeCuir (Volume 10, Pages 14-32), and Bender (Volume 10, Pages 33-43).

DeCuir was asked specifically whether in the course of his examination he had asked Miranne, Sr., whether he had ever planned or discussed business transactions or dealings with Mahl. He answered this in the negative. (Volume 10, Page 30). He was further asked the following question, "Now, if a real estate man had called Mr. Miranne and tried to work up a deal in connection with property that Mr. Miranne owned and Mr. Miranne didn't take him up on it, would you have called that a financial transaction? Would you call that a business deal that he was involved in with the person who called him? DeCuir

answered as follows: It wouldn't be a financial transaction. It would be a proposed transaction." (Volume 10, Pages 30-31).

The other FHLBB examiner, William Bender, followed DeCuir on the witnes stand. Bender admitted under cross-examination that he had never asked Miranne whether he had ever had any business discussions with Mahl.

The following exchange took place between counsel for Miranne, Sr., and the witness, Bender:

> Q: "Now, if Mr. Mahl had called Mr. Miranne, Sr. and proposed a business deal to him and nothing ever came of it, would you say that Mr. Miranne had been involved in a business deal with Mr. Mahl?
>
> A: No, sir.
>
> Q: You would not? If Mr. Mahl had called Mr. Miranne, Sr. and proposed the putting of a dummy mortgage on property belonging to Mr. Miranne but nothing ever came of it, Mr. Miranne never agreed to it, would you call that a business deal?
>
> A: No, I would not.
>
> Q: If Mr. Mahl as a real estate broker or agent had called Mr. Miranne and tried to hustle business, that is, get to sell a piece of property belonging to Mr. Miranne, and nothing ever came of it, would you call that a business deal?

A: No, I would not." (Volume 10, Page 38)

While counsel is well aware that these two Government witnesses cannot be called upon to decide the case, and that their interpretation of answers given by Miranne in response to their questions are not binding upon the jury, counsel does feel and earnestly represents that the obvious weakness of the Government's position in claiming that this taped conversation proved perjury makes it even more apparent that the jury must have depended upon the testimony of Toranto and/or Mahl in arriving at their verdict.

The authorities cited above, under these circumstances, demand that the verdict of the jury be reversed.

CONCLUSION

> "Deliberate deception of a court and jurors by presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States, supra.*

A conviction which is based upon perjured testimony has a chilling effect upon the administration of justice. To allow the Government to espouse unto itself the perjured testimony of one of its witnesses is indeed incompatible with the rudimentary demands of justice. The perjured testimony of Toranto when viewed in the light of the other key witnesses who were impeached by the Government is crucial.

Federal prosecutors are under an affirmative obligation not merely to avoid using perjured testimony, but also to correct false testimony by its witness. Further, federal prosecutors may not vouch for the credibility of their witnesses. Where, therefore, a federal prosecutor transgresses both prohibitions, manifest error exists, and a conviction cannot stand.

To permit prosecutors to violate these basic and all important principles endangers the public confidence in the integrity of our entire judicial system. This cannot be permitted.

To remedy the denial of due process to petitioners, petitioners respectfully request that the Court issue a writ of certiorari, vacate the conviction and remand the case to the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that three copies of the foregoing Petition of Certiorari has been served on the Solicitor General of the United States, Room 5614, Department of Justice Building, Washington, D.C. 20530, by hand on December 1, 1982.

Don M. Richard

COUNSEL FOR PETITIONER